Chapter 8: Search and Seizure

8-1 Overview of Search and Seizure

Both the Fourth Amendment to the United States Constitution, and Article 1, Section 11 of the Michigan Constitution forbid "unreasonable searches and seizures" by the government. This chapter will outline the procedures and some strategies for litigating search and seizure claims in motions practice, but it will not attempt to exhaust the body of law devoted to these constitutional principles. The law governing of search and seizure is extensive and is always developing. For an excellent guide to that body of law, refer to the Defender Trial Book (State Appellate Defender Office, 2012).[1]

Any motion to suppress physical evidence should set forth all the possible grounds for suppression. A failure to allege all grounds may result in the issue being *forfeited or waived and precluded from later review*. The motion must, at a minimum, allege facts which, if true, would justify the suppression of the seized evidence. If the prosecution's answer to your motion contains facts different from those you have alleged, the court should hold an evidentiary hearing. In some cases, prosecutors will not respond to defense motions in writing. As a general practice, you should insist on a written response so you will have some idea about how to prepare for an oral argument or an evidentiary hearing on your motion.

[1] Another excellent source is "Making Sense of Search and Seizure Law: A Fourth Amendment Handbook," by Phillip Hubbart.

In addition to alleging facts supporting an illegal search or seizure, you must also allege facts that indicate that your client has standing to contest the violation. This is an important tactical decision, as establishing standing will typically require your client to admit to having a possessory interest in the property at issue. If your planned defense at trial will be that your client was not in possession of the property, you must always assess the strength of your suppression claim and ensure that it fits your general trial strategy.

In bringing a suppression motion, you ideally want to get the requested relief without giving up information about your trial strategy. Allege all possible **legal grounds** for suppression, but allege only enough **facts to provide the basis for the legal grounds**. Tread carefully, however, if you fail to allege a possible legal ground for suppression, you will likely be precluded from raising it at the hearing and you will also be precluded from raising it in a later appeal.

There have been several significant developments in search and seizure jurisprudence in Michigan in recent years. The Michigan Supreme Court has stressed that only constitutional violations -- and not statutory or court rule violations -- will support the suppression of evidence, unless the statute or rule expressly provides for a suppression remedy. *See e.g.*, *People v. Hawkins*/*People v. Scherf*, 468 Mich. 488 (2003)(*Hawkins* involved a statutory violation and *Scherf* involved a court rule violation); and *People v. Hamilton*, 465 Mich. 526 (2002)(a statutorily illegal arrest did not require suppression). Additionally, the Court adopted the "good faith" exception to the exclusionary rule in *People v. Goldston*, 470 Mich. 523 (2004).

Remember that any and all items that were illegally seized, regardless of their relevance, should be excluded as evidence. *See* Chapter 20: Motion 20.1.c.

8-2 Goals in Moving to Suppress

A successful suppression motion may gain significant, and sometimes dispositive, benefits for your client. A motion to suppress may also provide an opportunity to learn a great deal about the prosecution's case, can allow you to preview some of the witnesses who will testify against your client at trial, and the motion hearing can lock those witnesses into testimony that you can later use at trial.

Mich. Ct. R. 6.110(D) permits the trial court to decide a suppression issue with:

1. a prior evidentiary hearing;[2] or
2. a prior evidentiary hearing supplemented with a hearing in the trial court; or
3. a new evidentiary hearing.

There may be occasions when it is in your client's interest to have the court decide the issue solely on the testimony from the preliminary examination without allowing the prosecution to supplement that testimony. Again, this is a strategic decision that can only be made in the context of each particular client's case.

8-3 General Principles of Search and Seizure Motion Practice

The Fourth Amendment's limitations on unreasonable searches and seizures govern state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Article 1, §11 of the Michigan Constitution provides the analogous state constitutional provision.

Searches "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Those exceptions include the following:

1. when the search occurs as a result of the valid consent of an authorized person, *Pierson v. Callahan*, 555 U.S. 223 (2009)[see section 8-5-2-d, below]; incident to a valid arrest, *Maryland v. Wilson*, 519 U.S. 408, 422 n.11 (1997), and *Arizona v. Gant*, 556 U.S. 332 (2009); under "exigent circumstances," *Warden v. Hayden*, 387 U.S. 294, 299 (1967), when certain motor vehicle stops are made, *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999); or when objects are in plain view, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); or
2. where the intrusion was minimal or where, as a practical matter, the police could not have obtained a warrant. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

[2] In Michigan, there is no longer a right to a new evidentiary hearing. The Michigan Supreme Court has overruled *People v. Talley*, 410 Mich. 378 (1981), which stood for the principle that a motion to suppress requires a full evidentiary hearing and not mere reliance on a preliminary examination transcript. In *People v. Kaufman*, 457 Mich. 266 (1998), the Court decided that a circuit court could make a decision on a motion to suppress from a preliminary exam record where the parties stipulate.

Illegally obtained evidence, both direct and indirect, must be excluded unless the evidence fits within a recognized exception. Consider, also, that there may be other exceptions to application of the exclusionary rule: 1) if the evidence sought to be introduced was obtained through an "independent source" (*see*, for example, *United States v. Davis*, 313 F. 3d. 1300 (CA 11, 2002), involving two 'bad' searches, but the third, based upon independent evidence, was valid; also, *Segura v. United States*, 104 S. Ct. 3380 (1984) (initial entry was illegal, but subsequent warrant, based upon independent evidence was valid)); 2) if the evidence would have been secured through "inevitable discovery" (see, for example, *Nix v. Williams*, 467 U.S. 431, 448 (1984); *People v. Stevens*, 460 Mich. 626, 635-39 (1999)); 3) if the taint from the illegality was adequately "attenuated" (see, for example, *Murray v. United States*, 487 U.S. 533 (1988)); and 4) if there was a "good faith" exception on the part law enforcement in the execution of a warrant. This creates an exception not to the warrant requirement, but to the exclusionary rule. While the good faith exception has existed for some time in the federal system, *United States v. Leon*, 468 U.S. 897, 924-25 (1984), it was only more recently adopted in Michigan. *People v. Goldston*, 470 Mich. 523 (2004). The Michigan Supreme Court granted leave October 29, 2010, in *People v. Mungo*, __ Mich. __ ; 789 N.W. 2d. 666 (2010), on the issue of whether the good-faith exception to the exclusionary rule allows admission of evidence seized pursuant to a warrantless search that was valid under the law pre-*Arizona v. Gant*, 556 U.S. 332 (2009). However, in April, 2011, the case was held in abeyance pending a decision in *Davis v. United States*, __ U.S. __ ; 131 S. Ct. 2419; 180 L Ed. 2d. 285 (2011), which was decided in June, 2011. The Michigan Supreme Court remanded to the Court of Appeals(), which held that the *Gant* principle did not apply to good-faith reliance on pre-*Gant* search-law.. *People v. Mungo* (On Second Remand), 295 Mich. App. 537 (2012).

The exclusionary rule was developed through case law "to deter future unlawful police conduct." *United States v. Janis*, 428 U.S. 433, 446 (1976)). There is a significant additional purpose of the rule, however: to prevent the courts from being a "party to lawless invasions of constitutional rights." *United States v. Leon*, 468 U.S. 897, 916 (1984); *Brown v. Illinois*, 422 U.S. 590 (1975); *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

Arrest

In Michigan, where the police have reasonable cause to believe a felony was committed and reasonable cause to believe your client committed it, your client can be arrested without a warrant. M.C.L. 764.15. This rule also applies to misdemeanors punishable by more than 92 days, and to misdemeanors punishable by less than 93 days when the officer witnesses the crime.

There are also a growing number of situations in which warrantless arrests are statutorily authorized. *See Defender Trial Book*, Chapter 1: ARREST.

Standing

In order to challenge the police action in question, your client must have standing to challenge the search. Standing requires that your client had a "reasonable expectation of privacy," that is, one that society is prepared to recognize as reasonable, in the area searched or item seized. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Courts have recognized that a defendant has a qualified expectation of privacy in the following areas:

Home: *Payton v. New York*, 445 U.S. 573 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978), unless vacated by defendant, *People v. Nash*, 418 Mich. 196 (1983).

Backyard: *People v. Hopko*, 79 Mich. App. 611 (1977); but see *California v. Ciraolo*, 476 U.S. 207 (1986); *People v. Smola*, 174 Mich. App. 220 (1988).

Residence where defendant is an overnight or "social" guest: *Minnesota v. Olson*, 495 U.S. 91 (1990). One who is merely present with the consent of the house owner, or is a short-term guest for illicit purposes, has no expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83 (1998); *People v. Parker*, 230 Mich. App. 337 (1998).

Motel room: *People v. Oliver*, 417 Mich. 366 (1983); *People v. Davis*, 442 Mich. 1, 10 (1993).

Trash: A person's expectation of privacy with respect to his trash depends on a number of factors, including where it is located, whether the dwelling is a single unit, who removed the trash, and where the search of the trash was conducted, *People v. Whotte*, 113 Mich. App. 12 (1982), though courts do not recognize an expectation of privacy if the trash is discarded in a public area, *California v. Greenwood*, 486 U.S. 35, 39-43 (1988).

Restroom stall: *People v. Kalchik*, 160 Mich. App. 40, 48-49 (1987) ("a bathroom stall, such as at issue herein, does not afford complete privacy, but an occupant of the stall would reasonably expect to enjoy such privacy as the design of the stall afforded").

Passenger in motor vehicle stop: *Brendlin v. California*, 551 U.S. 249 (2007).

Once the defendant has alleged an illegal search or seizure, it is the prosecution's burden to establish the legality of the police action. *People v. White*, 392 Mich. 404 (1974).

8-4 State Constitutional Protections and Statutory Provisions

As discussed in the introduction section to this book, it is important to always cite both the state and federal constitutional grounds for your motion to suppress tangible evidence. While the

Michigan Constitution cannot provide your client with less protection than the federal constitution, there may be areas where it provides your client with greater protection. Be certain that you know the protections offered by both constitutions, and you should always cite both.

8-5 Analyzing Search and Seizure Issues

As you think through the possibilities for motions to suppress physical evidence, it is often helpful to work through a checklist of possible avenues for relief and their respective bases. This checklist should not be considered exhaustive, but rather a starting place from which you can organize your Fourth Amendment claims.

1. Was your client stopped, arrested or taken into custody by the police at any time?

Think of the arrest as a film that you can slow down and "freeze-frame" as each action occurs. Break down the police action as much as possible. If the police intrusion escalated throughout an encounter with your client, consider whether the police have an articulable basis *for each escalation*. Your challenge to the police action may be multi-faceted.

a. By whom? Was this person a state actor?

Constitutional principles bind traditional law enforcement officers as well as parole officers, health, fire or building inspectors, safety inspectors and conservation officers. Private security guards, however, generally are not bound.

b. If so, how would you characterize that police action? Was it an "arrest" or something short of that?

Think strategically about how to characterize the action. It may be more advantageous to characterize it one way, rather than another.

c. If it was something short of an "arrest," was it a *Terry* stop?

If so, was it warranted? Did the police have the authority to make such a stop? What facts will the police articulate to justify their action? Think about how you either can counter those facts or cast them as equally consistent with innocence. This is your opportunity to describe the facts in your client's favor. Did they conduct a frisk after that stop? If so, were they entitled to under the circumstances?

d. If it was an "arrest," did the police have probable cause?

Remember, an "arrest" is merely a seizure requiring probable cause. That the police did not consider your client under formal arrest until another point during the encounter is not at all dispositive of the legal question of whether the police

seized your client in such a way that required probable cause. Generally, if a reasonable person would not feel free to leave the police encounter, it is an arrest. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

e. Did the police search your client's person incident to the arrest? Was the search lawful?

f. Where exactly did they search and what authority did they have to conduct each search? Did the police search any closed containers (bags, knapsacks etc.) in your client's possession?

g. What will they claim about needing to search those containers without first getting a warrant? What was the exigency if the client was in custody?

2. Did police enter or search your client's home, or other premises in which he or she has standing?

a. Did the police have a search warrant? Was the warrant issued validly and did the police execute it validly?

Consider whether the warrant complied with federal and state constitutional standards and met statutory requirements. Be prepared to compare the facts alleged in the affidavit with the actual facts.

b. Did the police have an arrest warrant? Did the police limit their activity to that proscribed by warrant or use it to search more?

If the police did not have an arrest warrant and your client is charged with a misdemeanor, the arrest may have been unlawful.

c. Was there an exigency that allowed the search?

Is what the police considered an exigency considered one under the law? Were there other witnesses who can corroborate the description?

d. Did someone consent to the search? Did that person have the authority to consent to the search?

It is not necessarily the case that another member of the same household has the authority to consent to a search of the entire household. Parents cannot necessarily give a valid consent to a search of their children's rooms, and vice versa. Co-tenants cannot necessarily give a valid consent to a search of their roommate's rooms. Also, the police may not coerce consent. As a general rule, consent must be unequivocal, specific, and freely and intelligently given. *People v. Beydoun*, 283 Mich. App. 314, 337 (2009); and see *Bumper v. North Carolina*, 391

U.S. 543 (1968). The scope of a consent search is limited by the object of the search, *People v. Wilkens*, 267 Mich. App. 728, 733 (2009), and may be further limited -- as well as revoked -- by the person giving the consent. *People v. Frohriep*, 247 Mich. App. 692, 703 (2001).

e. Were the items seized in plain view?

Were there other witnesses to the seizure? It is helpful if there are witnesses, other than your client, who can verify that the items seized were not in plain view.

3. Did police stop, search or seize a motor vehicle in which your client had standing?

a. Did police stop the vehicle? What was their basis for the stop?

If the basis for the stop was a traffic violation, was that used as a pretext? Be careful about specifically alleging a "pretext stop," for the subjective intent of the officer is not relevant to the court's inquiry, and the prosecutor or court may latch onto the phrase and minimize your substantive arguments. *Whren v. United States*, 517 U.S. 806 (1996)("[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.") However, the officer's credibility is relevant in the suppression hearing and may properly be assessed by the judge.

b. Did police order your client out of the vehicle?

If so, when? Consider whether anything else occurred to escalate or justify the police action.

c. Did the police search the vehicle incident to the arrest of your client? Was the arrest valid? Was the search properly limited in scope?

The scope of the search is defined by the object of the search. *Arizona v. Gant*, 556 U.S. 332 (2009).

d. Did police conduct an evidentiary search of the vehicle? Did they have probable cause for that search?

Police are permitted to search every part of the vehicle and any items in it which may conceal the object of the search when they have probable cause to believe that the automobile contains contraband or evidence or that it is transporting individuals who have committed, are committing or are about to commit a crime.

e. Was the vehicle impounded and searched as an "inventory search?"

Was the search carried out in accordance with standard procedures? What are the parameters of those procedures? Secure and review a copy of the police department or seizing agency's written policy.

4. Did the police act on the basis of information obtained from informants? Is the source anonymous or known? Is the source reliable?

Courts will afford identified informants with more credibility than anonymous informants. *See*, for example, *Florida v. J.L.*, 529 U.S. 266 (2000)(upholding suppression of a firearm; "an anonymous tip lacking indicia of reliability . . . does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm."). Where an unnamed informant provides a face-to-face tip to police, however, the informant will be deemed more reliable. *See People v. Barbarich*, 291 Mich. App. 498 (2011). Courts will judge identified informants by all of the standard rules of witness credibility. Note that if the informant is a "professional" police informant, rather than a concerned citizen, his credibility is *more* questionable.

5. Is the evidence tainted by the violation?

a. Is it a "fruit of the poisonous tree?"

Think broadly about what might constitute a "fruit" of the illegal police action. In addition to physical evidence, statements and identification procedures can be "fruits" of an unlawful search or seizure.

b. Would it have been discovered by lawful means anyway?

In drafting the motion, you will rarely need to include much more than enough facts to get your client a hearing. For the hearing, however, you will want to have thoroughly analyzed *each level of police intrusion*. From this you must decide how to characterize the intrusion so that you can devise a cross-examination strategy that is consistent with your theory. Of course, *know* the specific facts of your client's case. Thoroughly read and review all available reports and videos.

8-6 Guide to Sample Motions

The sample motions are of two types. First, we have drafted generic suppression motions which attempt to cover the most common fact scenarios, such as on-the-street encounters, car stops, and in-home searches with and without warrants. For most suppression of physical evidence motions, a simple motion similar to these will suffice. However, when the facts present a more complicated issue which may involve the search or seizure, the question of standing, or a

question of taint, we recommend filing a memorandum of law which addresses that question in greater detail.

In most cases, you are better off simply alleging facts to get your client a hearing, and then addressing any problems after the benefit of testimony. After testimony comes in, you should address problems either in oral argument to the court, or by filing a supplemental brief on the issue with the court's permission. However, there may be exceptions to this course of action. First, if the prosecution's responsive pleadings raise concerns about whether the court will grant you a hearing on the issue, it may make sense to file a reply brief answering the issue. Second, in some cases, you may want to alert the court to a particular area of the law about which you suspect the court may need education, in order to frame the suppression issue in that context before the hearing. However, neither of these decisions can be made in the hypothetical, and you must be careful to make them in the context of your particular client's case.

8.1.a Motion to Suppress (multiple grounds)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The following is a model which is fact-specific. Adapt with caution for your own case.

Defendant, defendant's name, by his attorney, moves this Court to suppress describe in detail all evidence you are seeking to suppress as a result of an unlawful search or seizure. This motion is based on the Fourth Amendment of the United States Constitution, Michigan Constitution 1963, Section 11, and the following:

1. On September 1, 1999, the Defendant was charged with possession of a controlled substance in violation of M.C.L. 333.7403.

On-The-Street Encounter: Use this section if appropriate, working from this model.

2. John Doe was standing on a public street when he was approached for no particular reason by Officer Moore. John Doe was not engaged in any criminal conduct. He was merely talking to two friends, conduct which is completely innocent.

3. Officer Moore detained the defendant, Mr. Doe, and his friends. He proceeded to question them about what they were doing. Officer Moore searched the Defendant's pockets and knapsack, without his consent, and allegedly recovered a small bag of marijuana.

4. Officer Moore lacked reasonable suspicion needed to detain the defendant. *Terry v. Ohio*, 392 U.S. 1 (1968); *Florida v. Royer*, 460 U.S. 491 (1983); *Adams v. Williams*, 407 U.S. 143 (1972); *People v. Walker*, 130 Mich. App. 304 (1983).

5. The Defendant was not free to leave while Officer Moore detained him. Officer Moore's conduct amounted to a seizure requiring probable cause. Because Officer Moore lacked probable cause

to seize Mr. Doe, the marijuana must be suppressed. *People v. Bloxson*, 205 Mich. App. 236 (1994). Officer Moore had no lawful basis for conducting a warrantless search of Mr. Doe's person.

6. As a result, Mr. Doe's right to be free from unreasonable searches and seizures was violated. U.S. Const. Am IV; Mich. Const. 1963, art 1, §11. The evidence recovered must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. LoCicero*, 455 Mich. 496 (1996).

Car Stops/Seizures: Use this section if appropriate, working from this model.

2. Mr. Doe was driving South on I-75 when he was motioned to pull his car over by Officer Moore. Mr. Doe complied with Officer Moore's order. Mr. Doe had not committed any traffic violations at the time he was pulled over.

3. After pulling his car to the side of the road, Mr. Doe provided Officer Moore with his license and registration, both of which were current and valid.

4. Officer Moore then ordered Mr. Doe out of his vehicle. Mr. Doe complied with Officer Moore's orders and stepped out of his car.

5. Officer Moore then proceeded to search Mr. Doe's car. Officer Moore's search included a search of a closed container in Defendant's glove compartment.

6. Officer Moore lacked any lawful basis to stop Mr. Doe's car. *People v. Parisi*, 393 Mich. 31 (1974).

7. Officer Moore also lacked any lawful basis to order Mr. Doe out of his car and proceed to search the car. *Knowles v. Iowa*, 525 U.S. 113 (1998); *People v. LaBelle,* 273 Mich. App. 214 (2006)[3].

As a result, the defendant, Mr. Doe's right to be free from unreasonable searches and seizures was violated. U.S. Const. Am IV; Mich. Const. 1963, art 1, §11. The evidence recovered must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. LoCicero*, 453 Mich. 496 (1996).

In-Home Search/Seizure Without a Warrant: Use this section if appropriate, working from this model.

2. John Doe lives at 1000 Maple Street, with his parents, Mary and David Doe. On Friday, September 1, 1999, Mr. Doe was at home watching television when Officer Moore knocked at the door. Mr. Doe's father answered the door.

[3] While *LaBelle* was reversed on appeal, *People v. LaBelle*, 478 Mich. 891 (2007) ("Because the stop of the vehicle was legal, the defendant . . . lacked standing to challenge the subsequent search of the vehicle"), the Michigan Supreme Court's decision does not upset the underlying principle that an unlawful stop cannot give rise to a lawful search. *People v. Leonard*, 2008 Mich. App. LEXIS 1110, #270638 (05-27-08) (ordering the exclusion of evidence obtained in a police search of an illegally stopped car).

3. Officer Moore entered the home and went to Mr. Doe's room. Officer Moore proceeded to search Mr. Doe's room and allegedly recovered a bag of marijuana from defendant's desk drawer.

4. Officer Moore did not have a warrant to search Mr. Doe's room.

. 5. John Doe did not give Officer Moore permission to search his room.

6. John Doe's father or mother did not give Officer Moore permission to search Mr. Doe's room. Nor did his father or mother have the authority to give Officer Moore permission to search Mr. Doe's room, which was not a common area, *People v. Bunker*, 22 Mich. App. 396 (1970), *habeas grt'd on other grds* 995 F2d 1066 (CA6, 1993). John Doe's father or mother did not have "common authority" over his room, *People v. Goforth*, 222 Mich. App. 306 (1997).

[You may also want to allege specifically how your client's room is not a common area and how the parents do not have "common authority" over the room; e.g., there are locks or other obstacles preventing access, your client excludes others from the space, the room is not shared with others, the parents do not do your client's laundry or clean the room, the parents do not frequently visit the room, and/or your client pays rent to the parent on a regular basis.]

7. The search warrant was not issued validly. *Franks v. Delaware*, 438 U.S. 154 (1978).

8. The search warrant was not executed validly. Officer Moore failed to leave any documentation of the search, at the search scene, including a copy of the warrant, affidavit, or list of items seized.

9. As a result, Mr. Doe's right to be free from unreasonable searches and seizures was violated. U.S. Const. Am IV; Mich. Const. 1963, art 1, §11. The evidence was recovered must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. LoCicero*, 453 Mich. 496 (1996).

For these reasons, Defendant John Doe asks that this Court grant his motion to suppress the marijuana seized from his desk drawer, as a result of an unlawful search and seizure, or, in the alternative, hold a hearing to resolve the issues presented in this motion.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.b Motion to Suppress (illegal arrest)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The following is a model which is fact-specific. Adapt with caution for your own case.

Defendant, defendant's name, by his attorney, moves this Court to suppress all physical evidence seized by the police. This motion is based on the Fourth Amendment of the United States Constitution, and Section 11 of the Michigan Constitution 1963, and is supported by the accompanying memorandum of law.

1. John Doe was arrested on Friday, September 1, 1999, and charged with possession of a controlled substance, in violation of M.C.L. 333.7403.

2. On September 1, 1999, at approximately 9:00 p.m., a car owned by John Doe's father, David Doe, was broken into by an unknown individual while the car was parked at the Oak Street parking structure. The car window was smashed and some items were taken from the car.

3. Officer Moore arrived at the scene to investigate the incident. The officers called Mr. David Doe, who confirmed that he was the owner of the car and that his son, John, had taken the car out that night with his permission.

4. John Doe, and two of his friends, subsequently arrived at the parking structure to get his father's car and go home. When they approached the car, they saw Officer Moore standing near the car, and noticed that the car window had been broken.

5. Officer Moore asked both John Doe and his friends for identification. They gave Officer Moore their identification and, in addition, John Doe gave Officer Moore the owner's registration from the car.

6. After Officer Moore inspected the identification, and although the police had learned from David Doe that John had permission to use the car, Officer Moore conducted a Law Enforcement Information Network (LEIN) search of John Doe's identification. This search revealed a prior outstanding warrant for contempt of court.

7. After discovering John Doe's outstanding warrant, Officer Moore placed him under arrest. The officer then searched Mr. Doe and allegedly recovered a plastic, yellow container filled with marijuana.

8. Officer Moore's detention of Mr. Doe to run the LEIN search was not limited to the circumstances justifying the detention, and was therefore, illegal.

For these reasons, John Doe asks that this Court grant his motion to suppress the marijuana seized by Officer Moore or, in the alternative, hold a hearing to resolve the issues presented in this motion.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.b.1 Memorandum of Law in Support of Motion to Suppress (illegal arrest)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

The following is a model which is fact-specific. Adapt with caution for your own case.

STATEMENT OF FACTS

On September 1, 1999, Detroit Police Officer Moore discovered an automobile in the Oak Street parking structure with a broken window. The police called John Doe's father, David Doe, to whom the car was registered. David Doe informed Officer Moore that he owned an automobile fitting the description given to him by Officer Moore, and that his son was using the car with his permission.

After this call, the Defendant John Doe and his friends arrived at the scene of the investigation. They provided Officer Moore with proper identification. John Doe also provided Officer Moore with the registration for the vehicle. After looking over the identification, Officer Moore took the licenses to his cruiser in order to run a LEIN search.

This search revealed an outstanding bench warrant for contempt of court against John Doe. Mr. Doe was then placed under arrest. Upon conducting a pat-down search, incident to the arrest, the officer recovered 3.58 grams of marijuana.

LEGAL ARGUMENTS

Because the police officers lacked reasonable suspicion of a crime, the detention of the defendant was unlawful and the evidence acquired pursuant to that detention should be suppressed.

The police detention of Mr. Doe was unlawful under Michigan law and, therefore, the evidence seized during that detention should be suppressed. In *People v. Burrell*, 417 Mich. 439, 457 (1983), the Supreme Court of Michigan held that:

Since Fourth Amendment rights are involved in a detention, however brief, the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention. Put another way, the detention must have an object (that fact or event which will resolve a police officer's reasonable and articulable suspicion) which is ascertainable and near at hand and officers must employ means that accomplish the purpose of the detention as quickly as possible. *Florida v. Royer*, 460 U.S. 491, 501 (1983).This is as true for a brief detention associated with a LEIN check to determine if a car is stolen as it would be for a longer detention.

According to the Court, the reason for the detention must correspond to investigation of some criminal matter. Under *Burrell*, Officer Moore had the right to detain Mr. Doe no longer than necessary to ascertain his identity, and therefore the right to use the vehicle.

Before detaining Mr. Doe, Officer Moore had spoken to Mr. Doe's father. David Doe had informed Officer Moore that his son John was driving his car that evening with his permission. Officer Moore had the right to detain Mr. Doe and his friends in order to ascertain their identification. After checking the identification of both Mr. Doe and his friends, and checking the registration of the vehicle, Officer Moore had no further reasonable or articulable suspicion regarding the ownership of the automobile. He therefore had no further right to consider either Mr. Doe or his friends as suspects in the investigation of the broken car window.

The Supreme Court of Michigan has held that a detention "must be reasonably related in scope to the circumstances that justified interference by the police." *People v. Champion*, 452 Mich. 92, 98 (1996), *cert den* 519 U.S. 1081 (1997). The LEIN check served no purpose that forwarded the investigation of the broken window. Nor did it further the effort to identify John Doe or his friends.

RELIEF REQUESTED

For these reasons, the detention of Mr. Doe in order to run the LEIN check was unlawful and the evidence acquired pursuant to that check was unlawfully acquired and must be suppressed.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.c. Motion to Suppress (Lack of Consent to Search Dwelling)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MOTION TO SUPPRESS

The Defendant, defendant's name, by his or her attorney, defense attorney's name, pursuant to M.R.E. 104(a), moves to suppress evidence seized during the warrantless search of a dwelling, for an evidentiary hearing, stating:

1. Defendant's name is currently charged with offense(s).

2. The charge arises from, and is based upon, evidence obtained during the search of residential premises at location, on date, by officers of the department name Police Department.

3. Those officers failed to obtain a search warrant before searching the premises at location on that date.

4. Officer name of officer and Sergeant name of sergeant of the department name Police Department, prior to the search of the premises, had requested the consent of one owner's name, the owner of the premises, to enter and search the premises; owner's name denied them consent to do so.

5. No valid consent was obtained to enter or search the premises at location, and for that reason the evidence seized during that search is inadmissible in these proceedings.

For these reasons, defendant's name asks that this Court suppress the evidence seized at the above premises.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.c.1 Memorandum in Support of Motion to Suppress (Lack of Consent to Search Dwelling)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

THE GOVERNMENT MAY NOT OFFER EVIDENCE SEIZED DURING THE SEARCH OF LOCATION WITHOUT FIRST ESTABLISHING THAT THE SEARCH OF THOSE PREMISES WAS LAWFUL.

A search or seizure without a warrant is unreasonable *per se* and violates the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, § 11 of the Michigan Constitution of 1963, unless shown to be within one of the exceptions to the rule requiring that a warrant be obtained prior to the search. *People v. Reed*, 393 Mich. 342, 362 (1975); *People v. Chism*, 390 Mich. 104, 123 (1973). The burden of proof is always on the government to show that an exception to the rule exists. *Reed, supra.*

A recognized exception is that a person may waive his Fourth Amendment rights and consent to a warrantless search of his person or premises. A search is not unreasonable if a person with a privacy interest in the item to be searched gives free and voluntary consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *United States v. Kelly,* 913 F. 2d. 261, 265 (CA6, 1990). The government bears the burden of proving, through *clear and positive testimony* that the consent to search was given voluntarily. *Bustamonte,* 412 U.S. at 248; *United States v. Salvo,* 133 F. 3d. 943, 953 (CA6, 1998). Consent is voluntary when it is *unequivocal, specific and intelligently given, uncontaminated by any duress or coercion. United States v. McCaleb,* 552 F. 2d. 717, 721 (CA6, 1977). Voluntariness is determined by examining the totality of the circumstances. *Bustamonte,* 412 U.S. at 227; *McCaleb,* 552 F. 2d. at 720.

Several factors should be examined in determining voluntariness. First, a court should examine the characteristics of the accused, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights. *United States v. Jones,* 846 F.2d. 358, 360 (CA6, 1988). Second, a court should consider the details of the detention, including the length and nature of detention; the use of coercive or punishing conduct by the police, *Bustamonte,* 412 U.S. at 226; and indications of *more subtle forms of coercion that might flaw [an individual's] judgment. United States v. Watson,* 423 U.S. 411, 424 (1976).

In this case, the home owner, owner's name unequivocally refused to consent to a search of the premises when asked for his consent. The prosecution will seek to justify the flagrantly unreasonable warrantless search by claiming that defendant's name voluntarily consented to the search. The officers' claim - that they were invited into the premises at location by defendant's name, and that she consented to the search - will be refuted not only by defendant's name, but by a civilian witness present during the exchange between the officers and defendant's name, one witness's name. Waiver or consent must be proven by clear and positive testimony, there must be no duress or coercion, actual or implied, and the government must prove that consent is unequivocal, specific, and freely and intelligently given. *People v. Kaigler*, 368 Mich. 281 (1962); *Bumper v. North Carolina*, 391 U.S. 543 (1968). The prosecution cannot meet that burden.

Once owner's name unequivocally refused consent to search the premises, asserting his Fourth Amendment right to do so, the officers were barred from searching those premises without a warrant. Even when two occupants of a dwelling are both present, the unequivocal refusal of one occupant to consent to the search of the dwelling invalidates the consent of the other present occupant. *Georgia v. Randolph,* 547 U.S. 103 (2006).

RELIEF REQUESTED

For these reasons the Defendant, defendant's name, asks that this Court suppress the evidence seized by police in this matter.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.d Motion to Suppress (stale warrant)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

No. Docket Number
Hon. Judge's Name

DEFENDANT'S NAME

Defendant.
_____/

MOTION TO SUPPRESS

The following is a model which is fact-specific. Adapt with caution for your own case.

The Defendant, defendant's name, by his or her attorney, defense attorney's name, moves this Court to quash the search warrant and to suppress the evidence obtained in executing that warrant, stating:

1. On February 14, 2001, Detective Roger Moore of the Clinton Township Police Department (CTPD) executed an affidavit for a search warrant (affidavit), attached as Exhibit A, seeking to search a home at 12345 Oak Street, in the City of Detroit, Wayne County, Michigan.

2. That affidavit failed to establish probable cause for the issuance of a search warrant, by failing to establish that an anonymous confidential source, who provided the allegations of a drug buy upon which a determination of probable cause was based, was reliable.

3. The warrant that issued on the basis of the anonymous sources information was stale; more than 144 hours passed between the alleged drug buy and issuance of the warrant, and another 40 hours passed between issuance and execution.

4. On August 14, 2001, Magistrate Janet Jones of the 41-B District Court, in an abuse of her discretion, erroneously and improperly issued a search warrant based upon that defective affidavit, attached as Exhibit B.

5. At approximately 9:00 p.m. on August 14, 2001, officers of the CTPD, among others, then unlawfully and forcefully entered, by breaking in the front door at 12345 Oak Street.

6. The Defendant, John Doe, was arrested on the premises and searched.

7. The issuance of the search warrant and resulting entry of 12345 Oak Street, the search of that home and the seizure of evidence from that home and from the person of John Doe, violated the rights, privileges and immunities granted to him by the constitutions and laws of the United States and State of Michigan, as is more fully set forth in the accompanying memorandum.

RELIEF REQUESTED

For these reasons, defendant's name asks that this Court quash the search warrant, suppress the evidence seized in execution of that search warrant, and suppress the evidence seized from the person of defendant's name during execution of that search warrant.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.d.1 Memorandum of Law in Support of Motion to Suppress

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

_____

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

No. docket number
Hon. judge's name

DEFENDANT'S NAME

Defendant.
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

The following is a model which is fact-specific. Adapt with caution for your own case.

STATEMENT OF FACTS

On February 14, 2001, Detective Roger Moore of the Clinton Township Police Department (CTPD) executed an affidavit for search warrant (affidavit), attached as Exhibit A, seeking to search a home at 12345 Oak Street, in the City of Detroit, Wayne County, Michigan. On August 14, 2001, Magistrate Janet Jones of the 41-B District Court signed and issued a search warrant (attached as Exhibit B) based upon the affidavit.

At approximately 9:00 on August 14, 2001, officers of the CTPD, among others, then unlawfully and forcefully entered, by breaking in the front door at 12345 Oak Street. Defendant, John Doe was arrested on the premises and searched. Mr. Doe is charged with Possession with Intent to Deliver Cocaine, M.C.L. 333.7401(2) (A)(4), based upon the evidence seized during execution of that warrant and during a search of his person.

Defendant now moves to quash the warrant and suppress the evidence, claiming that the affidavit at issue failed to establish probable cause for the issuance of a search warrant, by failing to establish that an anonymous confidential source, who provided the allegations upon which a determination of probable cause was based, was reliable.

> The pertinent portion of the affidavit at issue states:
>
> Affiant spoke with Confidential Informant #01-123, hereafter referred to as CI, who stated that he/she could purchase crack cocaine from a black male known to him/her as "Johnny" from 12345 Oak Street, Detroit, Wayne County, Michigan.
>
> *Within the past 144 hours*, Affiant met with CI and searched him/her with negative results for contraband or additional money. Affiant supplied CI with prerecorded Clinton Township Police Special Investigations Division buy funds. Affiant observed a white Chrysler 4 DR vehicle with temporary plates arrive at 12345 Oak Street, Detroit, MI occupied by two black males who went into the house. CI was surveyed directly to 12345 Oak Street and was observed to go into the side (east) door. A few minutes later, CI exited the house through the east door and was surveyed to a predetermined location where he/she turned over to Affiant a quantity of suspected crack cocaine. *CI stated that he/she saw additional quantities of crack cocaine inside the house*. CI was searched with negative results for contraband or additional money (emphasis added).

ARGUMENT

> *The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement! Miller v. United States, 357 U.S. 301, 307, 78 S. Ct. 1195(1958) (quoting Pitt's address in the House of Commons in March, 1763).*

None of the allegations contained in the affidavit are sufficient to establish the requisite probable cause for the issuance of the search warrant. Const. 1963, Art. 1, Sec. 11 provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

The United States Constitution extends special safeguards to the privacy of the home. *United States v. Orito*, 413 U.S. 139, 142 (1973). Those safeguards, given concrete form in the Fourth and Fourteenth amendments, have drawn a firm line at the entrance to the home. *Payton v. New York,* 445 U.S. 573, 590 (1980). The security of one's privacy against arbitrary intrusion by the police, which is the

core value protected by the Fourth Amendment, is basic to a free society. Privacy in the home has the longest constitutional pedigree of any constitutional protection; the sanctity of the home is this society's most cherished tradition.

As noted by the court in *Payton v. New York*, 445 U.S. 573, 583-586 (1980):

It is familiar history that indiscriminate searches and seizures conducted under the authority of *general warrants* were the immediate evils that motivated the framing and adoption of the Fourth Amendment.[21] Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures.[22] As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.[23] The Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[21]. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials *blanket authority to search* where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book, because they placed the liberty of every man in the hands of every petty officer. The historic occasion of that denunciation, in 1761 at Boston, has been characterized as perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "'Then and there'," said John Adams, "'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born'." *Boyd v. United States*, 116 U.S. 616, 625. *Stanford v. Texas*, 379 U.S. 476, 481- 482; see also J. Landynski, Search and Seizure and the Supreme Court 19-

48 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13-78 (1937); T. Taylor, Two Studies in Constitutional Interpretation 19-44 (1969).

[22]. The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized. Annals of Cong., 1st Cong, 1st sess., p. 452. *Lasson*, *supra*, at 100, n. 77.

[23]. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against *unreasonable searches* was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment. *Lasson*, *supra*, at 103. (Footnote omitted.)

It is settled law that probable cause to search must exist at the time a search warrant is issued, and that probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched. *People v. Russo*, 439 Mich. 584, 606, 607 (1992). In determining the existence of probable cause to issue a warrant, a magistrate can consider *only* the information in the affidavit made before him. *People v. Sundling*, 153 Mich. App. 277, 285-286 (1986). Probable cause to search is concerned with whether certain identifiable objects are probably to be found at the present time in a certain identifiable place, and if the affidavit fails to establish that conclusion, the evidence should be suppressed as a matter of constitutional law. *Russo* at 605. While the Michigan Supreme Court has held that violation of statutory affidavit requirements does not require application of the exclusionary rule [*People v. Hawkins*, 468 Mich. 488 (2003)], both federal and state constitutions still require probable cause and a description of place and things, based on oath or affirmation. For that reason, the information must be recently obtained in order that a significant probability exists that the evidence sought is at the specified location. The *Russo* court noted that although once probable cause to *arrest* is established, absent the discovery of contrary facts, it is likely to continue indefinitely, but that it cannot be assumed that *evidence of a crime* will remain indefinitely in a given place. *Russo* at 605. Probable cause that the evidence sought [ever] was or remained in Mr. Doe's possession at the residence *cannot* be found on the face of the affidavit in the present case, given the lengthy passage of time between the alleged observation and the warrant's request. *Russo* adopted the

standard of fair probability whether the items sought are still present at the location to be searched, a standard the affidavit clearly fails to meet.

Further, to determine whether there is probable cause for issuing a search warrant when an informant is used, the affidavit must not only sufficiently provide sufficiently provide the underlying circumstances to allow the magistrate to judge independently whether or not the drugs are presently where they are alleged to be, it must also establish the informant's credibility and the reliability of the information. *People v. Gleason*, 122 Mich. App. 482, 490 (1983). The possibility that the informant is actually *nonexistent* is enhanced by the failure to identify the informant in the affidavit. *Gleason* at 490, n. 6.

An informant's credibility must be shown by an assertion of facts tending to support a finding of credibility. While proof of credibility may be accomplished in different ways, facts tending to show credibility should appear on the face of the affidavit. Further, an affidavit in support of a search warrant, when based on hearsay declarations of a confidential informer, must inform the magistrate of the underlying circumstances from which he or she can find that the informant was credible or his information reliable. See e.g., *People v. Wares*, 129 Mich. App. 136, 143 (1983). It is usually necessary that an informant who says that he has seen illegal activity or contraband in the place to be searched give some indication that the observations were *recent* before the magistrate may find probable cause to search the place. *People v. Reed*, 121 Mich. App. 286 (1982).

In the case at bar, the affiant used the statements of a source who remained anonymous in seeking the warrant. The analysis to be applied to the adequacy of the statements from such an unnamed person is set forth in M.C.L. 780.653(b):

> The magistrate's finding of reasonable or probable cause *shall* be based upon all the facts related *within the affidavit* made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> * * *
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and *either* that the unnamed person is credible *or* that the information is reliable.

The statute, therefore, places the burden on the affiant to make affirmative showings that the informant is credible or that the information is reliable. In Exhibit A, the affiant never stated that the informant had supplied any information in the past which was used and found to be truthful and reliable. Indeed, one may reasonably infer that the informant had never been used in the past, since

Detective Sylvester, an officer of considerable experience, did not document that any statements of the informant had been previously used.

There is simply insufficient information contained within the affidavit to allow the magistrate to conclude that the unnamed informant was either credible or that the information the informant provided was reliable. These factors, *plus* staleness (e.g., the search warrant was sought 144 hours after the controlled buy, and executed 40 hours later), render the affidavit defective. The passage of time (and 144 hours is an eternity when the crime suspected is drug trafficking) is a valid consideration in determining whether probable cause exists. *People v. David*, 119 Mich. App. 289, 295 (1982); *People v. Russo*, *supra.*

The measure of a search warrant's staleness rests upon whether probable cause is sufficiently fresh to presume that the items sought remain on the premises. *People v. Gillam*, 93 Mich. App. 548, 552 (1979); *People v. Sundling*, *supra.* A common sense reading of the affidavit in this case leads any reasonably objective person to conclude, given the nature of the criminal activity (drug trafficking), the lack of any evidence of an ongoing pattern of criminal activity, and the portability of the evidence sought, that it was unlikely that any drugs would be found at 12345 Oak Street. The good fortune of the officers does not remedy the patent defects of the affidavit at issue. This is a case in which application of the exclusionary rule is appropriate, both as a matter of state and federal constitutional law, and because statutory requirements were violated. Exclusion of evidence for a statutory violation is an option not completely foreclosed by the Michigan Supreme Court's recent decision in *Hawkins*, above.

RELIEF REQUESTED

For these reasons, defendant's name asks that this Court quash the search warrant, suppress the evidence seized in execution of that search warrant and suppress the evidence seized from the person of defendant's name during execution of that search warrant.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.e Motion to Suppress (legal car stop, illegal detention)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.

MOTION TO SUPPRESS AND FOR EVIDENTIARY HEARING

The following is a model which is fact-specific. Adapt with caution for your own case.

Defendant, defendant's name, by his or her attorney, attorney's name moves this Court to suppress all physical evidence seized by police during the search of his automobile and person. This motion is based on the Fourth Amendment of the United States Constitution, and Section 11 of the Michigan Constitution 1963, and is supported by the accompanying memorandum of law.

1. Defendant, John Doe, is charged with two (2) misdemeanor counts: possession of marijuana and possession of drug paraphernalia.

2. All of the evidence supporting the two (2) charges was based on a search of John Doe and his automobile after a traffic stop for a defective tail light.

3. After all valid purposes for the traffic stop had been resolved or dissipated, the officer making the traffic stop instructed John Doe that he was about to request a drug dog, who would sniff the vehicle for drugs. The officer advised that this "could take a while," and that the defendant was not free to go.

4. The threat to bring canines to the scene required detention of John Doe and his vehicle well beyond any proper purpose for the stop, and resulted in an illegal seizure.

5. At the time of the threat, John Doe had been detained beyond any valid purpose for the traffic stop, which in and of itself was a violation of the Fourth Amendment and the Michigan Constitution.

6. The officer asked John Doe to produce any contraband which might be in the vehicle, and to allow him to search the vehicle as an alternative to waiting for the drug dog. This demand was made a full one-half hour after the initial stop.

7. There was no probable cause, or even reasonable suspicion, to detain John Doe beyond the only valid purpose of the stop, as a traffic ticket issued in mere minutes. No conduct or circumstances gave rise to any reason to suspect that contraband was present.

8. John Doe agreed to the officer's demand, allowing the search which produced marijuana in the vehicle. This consent was involuntary as the fruit of an illegal detention which went well beyond the permissible scope of the traffic stop.

9. The search and seizure without a warrant, without a valid consent and without probable cause violated the Fourth Amendment and the Michigan Constitution.

10. All of the evidence against John Doe should be suppressed due to the constitutional violations.

For these reasons, Defendant, defendant's name, asks that this Court suppress all of the evidence against him or her, dismiss the charges with prejudice and discharge defendant's name from custody. If any of the facts supporting this motion are not admitted by the prosecution or the Court requires a further record, Defendant also requests an evidentiary hearing.

Respectfully submitted,

_____

Defense Attorney Name (Bar Number)
Attorney for Defendant
Address
Address
Telephone

Dated: filing date

8.1.e.1 Memorandum of Law in Support of Motion to Suppress (legal car stop, illegal detention)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

The following is a model which is fact-specific. Adapt with caution for your own case.

A warrantless search is *per se* improper and unlawful absent a valid exception to the warrant requirement. No valid basis exists for an allegation here that the officer had probable cause or even a reasonable suspicion to believe Defendant's vehicle contained contraband. **State factual reasons for assertion in your case.**

After the officer stopped John Doe and issued a traffic ticket, according to his own police report, the officer told Mr. Doe that he must wait as the officer wanted to bring a narcotic dog to the scene. The officer's report indicated that his sole basis for going further and detaining defendant was the fact that Mr. Doe had a prior marijuana conviction. No conduct by Mr. Doe provided reasonable cause for further detention.

As an alternative to the lengthy detention required to await the dog, the officer requested that Mr. Doe allow him to search the vehicle. Due to the threat of a lengthy detention, Mr. Doe complied.

Defendant has filed a motion to suppress contending: (a) that the consent was invalid due to the threat of illegal detention, and (b) that the consent, search, and all evidence was the tainted fruit of the illegal detention which lasted longer than was necessary for the only valid purpose for the stop, to write a traffic ticket.

ARGUMENT

ALL EVIDENCE SEIZED FROM DEFENDANT HERE MUST BE SUPPRESSED DUE TO THE INVALID NATURE OF THE CONSENT AND AS A FRUIT OF THE POISONOUS TREE.

The officer's threat to illegally detain Mr. Doe for the time necessary to bring drug sniffing dogs to the location of traffic stop rendered Defendant's alleged consent involuntary. Such a threat that a search and/or seizure will occur, whether or not the consent is given, renders any alleged consent the product of duress and coercion if the officer's threatened action is illegal. *People v. Kaigler*, 368 Mich. 281, 295 (1962) [threat of unlawful warrantless search even if defendant did not consent]. The officer's false claim of authority to effectuate an illegal search or seizure, renders a consent involuntary. *Bumper v. North Carolina*, 391 U.S. 543 (1968) [consent based on officer's threat of search pursuant to a search warrant which the prosecution never produced]; *People v. Mullaney*, 104 Mich. App. 787 (1981) *See generally*, LaFave, *Searches and Seizures*, 8.2(a) 4th Ed. (2004).

The burden is on the prosecution to prove by clear and positive evidence that a criminal defendant's consent was unequivocal and specific, freely and intelligently given. *People v. Swinford*, 150 Mich. App. 507, 518 (1986), quoting *People v. Brown*, 127 Mich. App. 436, 440-41 (1983); *Bumper*, *supra*; *People v. Malone*, 180 Mich. App. 347, 355-56 (1989).

A citizen's consent to search is invalid when that consent is obtained by law enforcement actions which exceed the permissible bounds of a stop. *Florida v. Royer*, 460 U.S. 491 (1983) [fifteen minute seizure not justified although a short *Terry* stop was initially justified]; *People v. Bloxson*, 205 Mich. App. 236 (1994), citing *Royer*, *supra*.

A full fledged seizure occurs when a reasonable person would believe he or she was not free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *People v. Bloxson*, 205 Mich. App. 236 (1994). "A seizure occurs when police conduct . . . would convey to a reasonable person that he [is] not at liberty to ignore the police presence and go about his business." *Id.* Any seizure beyond the permissible bounds of a stop is illegal. *Royer*, *supra*. Any evidence obtained under these circumstances must be suppressed. *Bloxon*, *supra*.

The threat of detention for the length of time necessary to bring a canine to the scene would easily result in the objective reasonable person believing that he or she was not free to leave. Mr. Doe also reasonably held this belief. (Affidavit of Defendant).

In a number of jurisdictions, even the most minor threatened or actual detainment beyond the scope of the reasonable limits of a traffic stop has been held to invalidate any subsequent consent. In *Commonwealth of Pennsylvania v. Pless*, 679 A. 2d. 232, 233-34 (1996), the Court held invalid the consent given after the purpose for the stop, issuance of a traffic ticket, had dissipated. In *People v. Banks*, 650

N.E. 2d. 833 (N.Y., 1995), the court held that consent was an illegal fruit of a traffic stop which was extended for the purpose of effecting a search of the automobile. *State v. Robinette*, 685 N.E. 2d. 762 (Ohio, 1997) (after remand from the U.S. Supreme Court); *State v. Armenta*, 948 P. 2d. 1280 (Wash, 1997); *United States v. Fernandez*, 18 F. 3d. 874 (10th Cir. 1994) [extension of traffic stop to question about contraband is illegal]; *United States v. Babwah*, 972 F. 2d. 30 (2nd Cir. 1992) [extension of custody tainted consent when that extension appeared to be with hopes of obtaining consent and making otherwise illegal search].

This case provides a basis for suppression even better than that of *United States v. Smith*, 263 F. 3d. 571 (C.A. 6, 2001), where the Sixth Circuit Court of Appeals found an illegal detention following a traffic stop. There, the defendant's nervousness, some discrepancy in his travel plans, his companion's groggy appearance, their body odor, and food wrappers and soda cans did not provide police with the requisite reasonable and articulable suspicion of criminal activity that would justify detention to allow for a dog sniff. In this case, Mr. Doe's conduct and appearance were entirely innocent; the prior marijuana conviction did not provide the immediate temporal connection that is required for detention and search. Neither did the circumstances of the stop provide the reasonable suspicion, in contrast to the recent decision in *People v. Lewis*, 251 Mich. App. 58 (2002). There, the defendant took a one-day flight from Detroit to a known drug city, retrieved two pieces of luggage, appeared nervous at the airport and as he began his trip to Kalamazoo, drove on a major interstate and appeared extremely nervous during the traffic stop. Detention to await a drug dog was deemed reasonable. Here, Mr. Doe was driving from a grocery store to his home, had groceries in the back seat, and was not at all nervous when detained.

CONCLUSION

For these reasons, Defendant John Doe asks that this Court suppress all of the evidence seized during the warrantless search of his vehicle, and that this Court dismiss the charges with prejudice. Further, if any of the facts are not admitted by the prosecution and/or the Court requires more proofs, the Defendant requests an evidentiary hearing.

Respectfully submitted,

_____

Defense Attorney Name (Bar Number)
Attorney for Defendant
Address
Address
Telephone

Dated: filing date

8.1.f Motion to Suppress Blood Alcohol Evidence Due to Defective Search Warrant

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

_____

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MOTION TO SUPPRESS BLOOD ALCOHOL EVIDENCE DUE TO DEFECTIVE SEARCH WARRANT

The following is a model which is fact-specific. Adapt with caution for your own case.

NOW COMES, Defendant, defendant's name, by and through his retained counsel, attorney's name, pursuant to U.S. Const, Am IV, Const. 1963, art 1 § 11, M.C.L. 780.653(b) and moves to dismiss the case in the above captioned matter. In support thereof he states:

1. At approximately 4:46 a.m., on September 1, 2003, Defendant was stopped by Michigan State Police Trooper Williams, after he was observed to have traveled eastbound 1-96 at an excessive rate of speed.

2. That immediately upon being stopped, Defendant was subjected to a preliminary breath test in contravention of administrative regulation and state law. Hence any inference drawn from these results would be the fruit of the poisonous tree.

3. The test, producing knowingly unlawful results, was the basis for the ensuing search warrant affidavit.

4. The search warrant affidavit indicated Defendant passed alphabet, finger to nose and finger count. It stated that the defendant did not pass the one-leg stand.

5. The affidavit omits the fact that it was raining and Defendant was subjected to the one-leg stand test while his back was facing the freeway in a rainstorm.

6. The affidavit also states Defendant admitted that he consumed two shots of liquor one-half hour prior to the stop.

7. Last, it stated that there was a strong odor of alcohol.

8. These are insufficient facts to induce a magistrate to issue a warrant.

9. A blood draw was done sometime after six in the morning.

10. Based on the above, all blood alcohol test results must be suppressed.

For these reasons, Defendant, defendant's name, asks that this Court suppress all of the evidence against him or her, dismiss the charges with prejudice and discharge defendant's name from custody. If any of the facts supporting this motion are not admitted by the prosecution or the Court requires a further record, Defendant also requests an evidentiary hearing to:

A. conduct a Hearing and determine that there was no probable cause to arrest Defendant;

B. suppress the evidence unlawfully obtained against the defendant; and

C. provide any other relief it deems just and fair.

Respectfully submitted,

By:_____

Defense Attorney Name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.f.1 Brief in support of Motion to Suppress Blood Alcohol Evidence Due to Defective Search Warrant

STATE OF MICHIGAN

IN THE DISTRICT OR CIRCUIT COURT FOR THE NAME OF COUNTY

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff, **Case No. docket number**

Hon. judge's name

vs

DEFENDANT'S NAME

Defendant.

_____/

BRIEF IN SUPPORT OF MOTION TO SUPPRESS BLOOD ALCOHOL EVIDENCE

The following is a model which is fact-specific. Adapt with caution for your own case. Also, note that the brief is for illustrative purposes only, in that the statutory violation as a basis in the *Sloan* case was subsequently overruled in *People v. Hawkins*, 468 Mich. 488 (2003). The focus of your argument should be on the *Franks* issue, and not on a statutory violation.

The basic evil addressed by the Fourth Amendment is the protection of personal privacy against arbitrary intrusion by the police. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971). Accordingly, the amendment places very stringent limitations on the power of the police to invade an individual's privacy. *Berger v. New York*, 388 U.S. 4, 58 (1967). These limitations include that the probable cause determination be made by a neutral and detached magistrate, rather than by the officers conducting the search. Otherwise, the Fourth Amendment would be a "nullity" and homes would be "secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

"The Michigan Constitution provides that a search warrant may issue only on a showing of probable cause, supported by oath or affirmation." *People v. Sloan*, 450 Mich. 160, 166-167 (1995); Const. 1963, art. 1, §11. Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in the stated place. *People v. Kazmierczak*, 461 Mich. 411, 418 (2000). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. *See Sloan*, 450 Mich. at 167-168.

The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them. *Sloan*, 450 Mich. at 169, quoting *People v. Rosborough*, 387 Mich. 183, 199 (1972), quoting 2 Gillespie, Michigan Criminal Law & Procedure (2 ed), §868, p 1129.

A reviewing court must determine whether a reasonably cautious person could have concluded that there was a "substantial basis" for a finding of probable cause. *People v. Russo*, 439 Mich. 584, 603 (1992). In making this determination, erroneous information in the affidavit is excluded from consideration if the defendant can show by a preponderance of the evidence that the affiant has "knowingly and intentionally, or with reckless disregard for the truth" inserted it into the affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978); *People v. Reid*, 420 Mich. 326, 335-336 (1984). Omissions which are substantially misleading are likewise subject to the *Franks* rule. *People v. Stumpf*, 196 Mich. App. 218, 224 (1992); *People v. Kort*, 162 Mich. App. 680, 685-686 (1987). *See also*, LaFave, Search and Seizure 4.4(6) (4th ed. 2004). When the defect is the improper omission of material truths, then the affidavit is to be judged by in effect adding to the affidavit the information improperly omitted. *Id*, 1993 supp, § 4.4, p 44, and citations therein.

In the case at bar, the preliminary breath results must be suppressed because they are not compliant with Michigan statutory and administrative law. At an evidentiary hearing, Defendant strongly believes that he will prevail in showing that Trooper Williams was versed in his department's regulations and procedures as they relate to the administration of the PBT. The question then remains, does the affidavit present enough facts to allow the magistrate to conclude that there was probable to cause to believe that the fruits of a drinking and driving offense would be obtained. Defendant contends that the burden has not been met. The affidavit stripped of the offending PBT results indicates

that the Defendant had an odor of alcohol, had made a recent consumption of liquor and had operated at an excessive rate of speed. There were no facts to indicate that Defendant drove erratically. Defendant asserts that operation of his vehicle with a high rate of speed, in the given rain conditions, was actually indicia of unimpaired driving. In addition, the affidavit indicates that the Defendant successfully performed three out of four tests. The affidavit omits the manner in which the defendant failed the one test (holding foot in the air for 20 seconds and using arms for balance, midway through the test) and the conditions of the road side during testing (raining) and test area (defendant's back facing highway when executing the test).

Clearly the smell of alcohol can give rise to **reasonable cause** to submit to a field sobriety test. *People v. Rizzo*, 243 Mich. App. 151 (2000). This standard is less than that of probable cause. *See People v. Champion*, (emphasis added) 452 Mich. 92, 98 (1996), where the Michigan Supreme Court further explained the reasonable suspicion required in order to justify a Terry investigative stop: "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' **but less than the level of suspicion required for probable cause**." Since it cannot be considered as a factor of probable cause to issue a search warrant, the odor of alcohol must also be omitted from consideration.

The trooper placed emphasis on Defendant's excessive speed. Had he included the fact that Defendant was operating a vehicle at a high rate of speed in the rain, there may have been sufficient facts to challenge whether there was enough facts present to issue a search warrant. This omission was misleading and thus the speed factor cannot be considered.

The remaining factor, performance on the one failed test, is stated in conclusory language and is the inference of the affiant. It fails to set forth, with any specificity, how the presence of this factor would be indicia of drunk driving. In addition, the omission of the "setting" in which defendant took the test is misleading and this must not be considered.

For these reasons, there must be a finding that there was no probable cause to issue the search warrant. The blood results obtained after the execution of the search warrant are the fruits of the poisonous tree and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Respectfully submitted,

By:_____
Defense attorney name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

8.1.f.2 Brief in Support of Motion to Suppress PBT Results (various grounds)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

_____

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

The following is a model which is fact-specific. Adapt with caution for your own case.

ARGUMENT

I. FAILURE BY THE TROOPER TO ADHERE TO TESTING PROTOCOLS FOR PRELIMINARY BREATH TESTING REQUIRES SUPPRESSION OF THE PBT RESULTS.

M.C.L. 257.625a(2)(b) provides:

> (b) The results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:
>
> (i) To assist the court or hearing officer in determining a challenge to the validity of an arrest. This subparagraph does not limit the introduction of other competent evidence offered to establish the validity of an arrest.
>
> (ii) As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered under subsection (6).
>
> (iii) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered under subsection (6).

In addition, Michigan State Police Administrative Regulation R 325.2655(2)(b) provides:

> A person may be administered a breath test on a preliminary breath alcohol test instrument only after it has been determined that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes.

In *People v. Mullen,* 282 Mich. App. 14 (2008), the Court of Appeals explained that the purpose of requiring observance of the 15 minute waiting period provided for by AR 325.2655(2)(b) is to ensure the accuracy of the test results and that a PBT should only be administered after the defendant's mouth has been clear of foreign substances for 15 minutes. *Id.* at 23.

Not every violation of an administrative regulation is going to require the suppression of evidence. For example, in *People v. Fosnaugh*, 248 Mich. App. 444 (2001), the Court was presented with a challenge to the admission of evidence where the police officer failed to give a second test after the driver submitted a first sample and the breath testing device detected alcohol in the second sample. The defendant in that case cited similar language to the above-referenced statute, and stated that there had to be a new 15 minute observation period before she was subjected to another breath test. The reviewing court found that because the first sample was validly obtained and that the administrative regulation stated that the arresting officer had discretion, as opposed to being required, to acquire a second result, there was no grounds to require the second test and hence a new observation period. The court held suppression of test results is required only when there is a deviation from the administrative rules that call into question the accuracy of the test. *Id.* at 450. However, "[w]here the administrative rules concerning the administration of Breathalyzer tests have not been complied with, the accuracy of those tests is sufficiently questionable as to preclude the test results from being admitted into evidence." *People v. Rexford*, 228 Mich. App. 371, 377 (1998).

Mr./Ms. defendant's name case is more akin to *People v. Boughner*, 209 Mich. App. 397 (1995), where the accused was observed for an eight-minute period and there was evidence that the suspect was moving his hands in his mouth area and putting things into it. The driver had not been under direct observation of the arresting officer. The Court of Appeals, in vacating the defendant's conviction, found that the concern that the mouth be free of anything that could interfere with the accuracy of the results mandated an invalidation of the breath results. In that case, the challenged evidence went to the heart of the statute and was of a nature that the noncompliance raised serious issues as to the accuracy of the evidence obtained.

In the instant case, the officer demanded that the Defendant submit to a preliminary breath test relatively shortly after the stop. It is expected the officer will testify that one fact leading to his suspicion of intoxication was a glass drinking-glass containing an unknown liquid that the driver

appeared to be consuming. It is believed that the officer will also testify that the entire stop lasted approximately 15 minutes, and that he did not observe the Defendant during the entire time because the officer was completing other tasks related to the stop. The officer's suspicion that Defendant had been recently been drinking something, combined with the length of the traffic stop and the officer's lack of observation during the entire time, leads to a reasonable conclusion that the Defendant recently had something in his mouth. As the *Boughner* case recognized, material inside the mouth would interfere with the accuracy of the results obtained.

The officer's failure to make the necessary inquiry whether the Defendant had smoked, regurgitated or consumed anything fifteen minutes prior to submission to the preliminary breath test, presents a serious question as to the accuracy of the test results. The officer's noncompliance with the regulation mandates suppression of the preliminary breath results.

II. A PBT ADMINISTERED WITHOUT A WARRANT OR A VALID EXCEPTION TO THE SEARCH WARRANT REQUIREMENT IS PER SE UNREASONABLE AND MUST BE SUPPRESSED AS OFFENSIVE TO THE 4TH AMENDMENT.

1. Blood Alcohol Testing Outside Of The Implied Consent Act Is Subject To The Warrant Requirement

The Michigan Supreme Court analyzed the admissibility of blood alcohol in *People v. Borchard-Ruhland,* 460 Mich. 278 (1999). There, the Court ruled that the admissibility of blood alcohol evidence obtained outside the purview of the Implied Consent Act, M.C.L. 257.625c, "is governed by the conventional Constitutional standards against unlawful searches and seizures found in the Fourth Amendment of the United States Constitution and Const. 1963, Art I, § 11." *Id*. at 293. The Court reached this conclusion by noting, "the taking of blood to determine alcohol content constitutes a search and seizure under the Fourth Amendment." *Id*. citing *Schmerber v. California*, 384 U.S. 757, 767 (1966).[1] The Court noted that the Defendant has a constitutional right to refuse to consent to a search, the assertion of which right cannot be a crime or evidence of a crime. *Id*, citing, *People v. Stephens,* 133 Mich. App. 294 (1984); *Camara v. Municipal Court of the City & County of San Fransisco,* 387 U.S. 523, 532-33 (1967).

Borchard-Ruhland held that the Implied Consent Act does not apply to the PBT. The consent form read by an officer before requesting a chemical analysis of breath, blood, or urine, specifically differentiates an evidential breath test (which is covered by the Implied Consent Act) from a PBT (which is not covered): "I will be requesting that you take a chemical test to determine the alcohol

content and/or presence of a controlled substance in your body. IF YOU WERE ASKED TO TAKE A PRELIMINARY BREATH TEST, YOU MUST STILL TAKE THE TEST I AM ABOUT TO OFFER YOU." (Emphasis in original). Thus, the PBT given to defendant's name was given outside the purview of the Implied Consent Act.

Recently, in *People v. Chowdhury,* 285 Mich. App. 509 (2009), the court again held that a PBT is a search for fourth amendment purposes. *Id.* The Fourth Amendment and Article 1, §11 of the Michigan Constitution guarantee the right of people to be free from unreasonable searches and seizures. "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *Borchard-Ruhland, supra*, at 293, citing *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *People v. Champion,* 452 Mich. 92 (1996). One established exception to the warrant requirement is a search conducted pursuant to valid consent. That exception does not apply here.

2. The "Consent" Exception To The Warrant Requirement Necessitates Complete Voluntariness

"Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances." *Borchard-Ruhland, supra*, at 294, citing *Schneckloth, supra; People v. Reed,* 393 Mich. 342 (1975). "The presence of coercion or duress normally militates against a finding of voluntariness." *Id* In reviewing the totality of the circumstances, ***the prosecution has the burden of proving "by clear and positive proof,"*** *United States v. Worley,* 193 F. 3d. 300, 385 (6th Cir 1990), that the search was consensual and "that the consent was freely and voluntarily given, and was not the result of coercion, duress, or submission to a claim of authority." *United States v. Bueno,* 21 F. 3d. 120, 126 (6th Cir 1994) (emphasis added).

"Because the government often asserts that a defendant consented in cases 'where the police have some evidence of illicit activity, but lack probable cause to arrest or search,' we carefully examine the government's claim that a defendant consented. Moreover, we note that not any type of consent will suffice, but instead, ***only consent that is 'unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion.'***" *Worley, supra* at 193 F. 3d. 380, 386 (6th Cir 1999) (emphasis added), quoting *Schneckloth, supra* at 227, and *United States v. Tillman,* 963 F. 2d. 137, 143 (6th Cir 1992).

In *Worley*, the District Court found that the defendant's statement, "you've got the badge, I guess you can" did not indicate consent to a search because a reasonable police officer "would not have

believed that [defendant's] response indicated that he clearly and unequivocally consented to the search." *Id* at 385, n 8. The court went on to hold that in determining whether the consent was unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion, the court should consider the following factors: "the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police." *Id*

In *Worley,* the court found that there was no evidence of overt duress or coercion; there was no lengthy detention and interrogation; the officers wore plain clothes, with no visible weapons; the encounter occurred in a public place; the parties spoke in conversational tones; defendant was calm and cooperative; and defendant's age, intelligence and education indicated the ability to freely consent. In the present case, the factors are similar, except that defendant's name was being held against his will on the side of a busy freeway by an officer dressed in full uniform, with weapon visible, and the patrol vehicle's slights were flashing. Additionally, the officer asked defendant's name for consent which defendant's name declined to give. The officer continued to demand consent until such time as defendant's name finally gave in to the officer's demands.

3. Mr. defendant's name "Consent" Was Not Voluntary

". . . where the government purports to rely on a defendant's statement to establish that valid and voluntary consent was rendered, we must also examine the content of that statement to ensure that it 'unequivocally, specifically, and intelligently' indicates that the defendant consented. Thus, in meeting its burden, the government must also establish that [defendant's] statement 'you've got the badge, I guess you can' was an unequivocal statement of free and voluntary consent, not merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request." *Worley, supra.* (citations omitted). The Court found that such a statement was not a knowing, intelligent and unequivocal consent.

In *Chowdhury*, *supra,* the court held that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Chowdhury* at 8, quoting *Farrow,* 461 Mich. at 208.

In *People v. Galloway,* 295 Mich. App. 634 (2003), the court agreed with the trial court's finding that consent to search was not unequivocal, specific, and freely and intelligently given when police

officers removed a subject from her home and detained her in a police car while repeatedly asking her for consent to search her home, and threatening her that it would take longer if they had to obtain a search warrant.

In the instant case, defendant's name was not really given a choice of whether or not he would consent to the test. He was being held captive by the armed police officer on side of a busy freeway. His initial attempts to refuse the officer's demand were met with hostility and repeated demands to submit. Defendant's name did not think that he had a free choice, and rather than engage in a conflict with an armed officer, defendant's name will was finally subordinated to that of the officer.

Mr. defendant's name will testify that he felt that he had no choice but to submit to the PBT because of the officer's aggressive behavior and repeated demands. Since the "consent" to the PBT was not unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion, the "consent" was invalid and the resulting search was unconstitutional. Moreover, since defendant's name arrest was based entirely on the results of the invalid PBT, his arrest was unlawful and all evidence gathered as a result of his arrest is inadmissible. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. LoCicero*, 455 Mich. 496 (1996).

III. CONTINUED DETENTION OF DEFENDANT'S NAME AFTER THE PURPOSE FOR THE STOP HAD EXPIRED AND WITHOUT REASONABLE SUSPICION OF ADDITIONAL CRIMINAL ACTIVITY, WAS A SEIZURE IN VIOLATION OF THE 4TH AMENDMENT AND ANY EVIDENCE COLLECTED MUST BE SUPPRESSED.

This case is similar to *People v. Burrell*, 417 Mich. 439 (1983). In that case, a Kent County Sheriff's Deputy stopped a vehicle for an equipment violation. The driver did not have an operator's license or a vehicle registration, and the officer suspected the vehicle was stolen.

The passenger in the vehicle, Burrell, gave a fictitious name of "Joe Williams" when asked his identity. The police ran a LEIN check on the vehicle and a check on the driver's name. The LEIN verified that the driver was licensed and that the car was not reported as stolen. The driver and the passenger were then detained further until the police could verify the passenger's identity. After the officer eventually found stolen goods in the car, Burrell and the driver were arrested for breaking and entering a private dwelling. The Michigan Supreme Court, in a near-unanimous decision,[2] found that the driver was properly stopped for an equipment violation. The Court noted that a detention following a stop for such a minor violation would be justified only for the length of time necessary to write a citation. Here, however, the stop immediately revealed a new set of circumstances, "a driver

without either an operator's license or a vehicle registration." The Court found that it was reasonable to suspect that the vehicle was stolen and thus, a further "detention was justified long enough to resolve the suspicion raised." *Id* at 453.

However, "when the LEIN check verified that [the passenger] was licensed and that the car was not reported as stolen, ***that suspicion expired***." *Id* Any further detention "could be justified only for the length of time required for [the deputy] to write a citation for [the driver's] failure to have a valid driver's license in his possession while driving." *Id* Thus, the Court held that the remainder of the stop was illegal and all evidence gathered after that point was subject to the exclusionary rule.

The Court explained its decision by starting with the premise that a brief detention for questioning is permissible, "if based on a reasonable and articulable suspicion of criminal activity." *Id* at 457. The Court went on to explain, "the detention must have an object (that fact or event which will resolve a police officer's reasonable and articulable suspicion) which is ascertainable and near at hand." The Court concluded, "Rather than having a crime and looking for the criminals, the police, here, had the 'criminals' and were looking for the crime." *Id* at 459.

As in *Burrell*, the officer in the instant case may have been justified in initially approaching defendant's name to address the issue of speeding. The officer may even have been justified in briefly detaining defendant's name to perform the field sobriety tests. However, once the officer eliminated his suspicions -- when defendant's name passed the field sobriety tests -- and after the LEIN showed no warrants, any suspicion of criminal activity expired and any further detention could not be justified. Requiring defendant's name to remain at the scene and participate in a search of his person was illegal.

1.A General Hunch Is Not Enough.

In *People v. Bryant*, 135 Mich. App. 206 (1984), the Court of Appeals ruled that police officers improperly detained defendants beyond the scope of a *Terry* stop. There, the police approached a vehicle and asked each defendant to exit and answer questions about why they had been running down the street. The defendants responded that they were looking for a friend's house. Not satisfied, the officers required the defendants to remain at the scene while other officers investigated a silent alarm activated at a jewelry store down the street.

The Court of Appeals held that the initial stop of the defendants was valid. However, noting that "a generalized suspicion or hunch is not enough to validate [a continuing stop]," the court held that the officers detained the defendants well beyond the scope of a *Terry* stop and "then searched for a crime to connect to defendants. Courts in this state have repeatedly disapproved of the practice of

detaining a suspected criminal while looking for a crime." *Id* at 213. While a police officer may ask questions and pat down the suspect for weapons, "any further detention or search must be based on consent or probable cause." *Id* at 211.

The brevity and limited nature of *Terry*-type stops have been repeatedly affirmed. See *United States v. Obasa*, 15 F. 3d. 603, 607 (C.A. 6, 1994). That is to say, "when police actions go beyond checking out the suspicious circumstances that led to the original stop, the detention becomes an arrest that must be supported by probable cause." *Id.* "In short, upon making the stop, the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *United States v. Butler*, 223 F. 3d. 368 (CA6 2000). But the detainee is not obligated to respond. "And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." *Id*

In *People v. Rizzo,* 243 Mich. App. 151 319 (2000), the defendant was stopped for having a broken taillight. After making contact with the driver and noticing the strong odor of alcoholic beverages on the driver's breath, the officer requested that the driver exit the vehicle and submit to field sobriety tests. The court held that the smell of alcoholic beverages could be enough evidence to allow the officer to request the driver submit to the next level of field sobriety tests. *Id.* at 161. However, the court, in reading M.C.L. 257.625a(2), specifically declined to hold that the smell of alcohol was enough to permit the officer to demand submission to a PBT.

> We do not believe that the statute is helpful in resolving the present issue, because it addresses when a police officer may require a motorist to submit to a PBT test. The statute's plain language does not address when a police officer may require a motorist to perform roadside sobriety tests. In this case, defendant challenged the officer's initial instruction that she get out of the vehicle and perform the sobriety tests. *Id.* at 160.

In the instant case, the officer had a hunch which he investigated by administering his choice of field sobriety tests. After defendant's name passed all of the field sobriety tests administered to him, the officer's hunch should have been dissolved. At no time did defendant's name admit to consumption of alcohol.

At the time that the officer demanded that defendant's name take a PBT the officer had no support for his suspicion that defendant's name was under the influence of alcohol, other than the officer's claim that he smelled the odor of alcohol when speaking with defendant's name. Further, the

officer actually had substantial evidence from which to conclude that defendant's name was not under the influence of alcohol, but the officer chose to disregard that evidence in favor of his hunch.

After defendant's name passed all of the officer's field sobriety tests, the officer was left with nothing more than a generalized suspicion that maybe defendant's name was under the influence. That generalized suspicion was insufficient to support either a *Terry* stop or an arrest. Although the officer might have started with reasonable cause to investigate suspicious activity, that suspicion vanished when the field sobriety tests chosen by the officer failed to provide any additional evidence of wrongdoing and, in fact, provided substantial evidence of innocence. The officer then had no authority to detain defendant's name any longer. Because the continued detention of Mr. defendant's name was illegal, all evidence gathered from it must be suppressed and this case should be dismissed.

---

[1] This reasoning has been extended to encompass breath alcohol tests as well as blood alcohol tests. *Skinner v. Railway Labor Executives Association,* 489 U.S. 602; 109 S. Ct. 1402; 103 L. Ed. 2d. 639 (1989). "It is obvious that the physical intrusion penetrating beneath the skin infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interest. Much the same is true of breath-testing procedures required under Subpart D of the regulations. **Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search."** *Id* at 616; 109 S. Ct. at 1413 (emphasis added).

[2] The decision was 6-0. Justice Boyle took no part in the decision of the case, having presumably sat on the Court of Appeals panel which ruled on the case in an unpublished *per curiam* opinion.